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IN THE

Supreme Court of the United States

October Term, 1958

No. 773

In the Matters

—of—

RUBIN L. SIEGEL (also known as R. LAWRENCE SIEGEL) and HADASSAH R. SHAPIRO, attorneys,

Appellants,

—vs.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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IN THE

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—of—

RUBIN L. SIEGEL (also known as R. LAWRENCE SIEGEL), an attorney,

Appellant,

—vs.—

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Appellee.

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—of—

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—vs.—

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Appellee.

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

Appellants R. Lawrence Siegel and Hadassah R. Shapiro submit herewith this statement as to the jurisdiction of this Court to review on appeal orders of the Court of Appeals of the State of New York. The appeals involve identical questions which were presented in a single brief to the Court of Appeals of the State of New York and a single jurisdictional statement is filed, pursuant to Rule 15(3) of the Rules of this Court.

Opinions Below

No opinions were delivered in the courts below.

The order of the Court of Appeals of the State of New York from which appellant R. Lawrence Siegel appeals is officially reported at 5 N. Y. 2d 708. The order of the Court of Appeals of the State of New York from which appellant Hadassah R. Shapiro appeals is officially reported at 5 N. Y. 2d 707. The said orders were not unofficially reported.

The order of the Appellate Division of the Supreme Court of the State of New York, First Department in the *Matter of R. Lawrence Siegel* is officially reported at 6 A. D. 2d 866, case 2 and unofficially reported at 176 N. Y. S. 2d 928, case 5. The order of the Appellate Division of the Supreme Court of the State of New York, First Department in the *Matter of Hadassah R. Shapiro* is officially reported at 6 A. D. 2d 866, case 1 and unofficially reported at 176 N. Y. S. 2d 928, case 6.

Grounds of Jurisdiction

The nature of the proceedings and the statute pursuant to which they are brought are as follows:

1. These are appeals from orders of the Court of Appeals of the State of New York, denying motions for

leave to appeal to said Court of Appeals from orders of the Appellate Division of the Supreme Court, First Department, which disbarred appellants from practice as attorneys and counselors-at-law in the State of New York and struck the names of appellants from the roll of attorneys and counselors-at-law in the State of New York. Said proceedings in the courts below were brought pursuant to Section 90, subdivision 4 of the New York Judiciary Law.

2. The orders of the Court of Appeals of the State of New York were made and entered October 16, 1958. No orders were sought or made respecting a rehearing. Appellants' notices of appeal were filed in the Appellate Division of the Supreme Court of the State of New York, First Department, on January 13, 1959.

3. The statutory provision believed to confer on this Court jurisdiction of the appeals is 28 U. S. C. §1257(2). Appellants draw in question the validity of Section 90, subdivision 4 of the New York Judiciary Law on the ground that it is repugnant to the Constitution of the United States, and the decisions of the highest Court of New York State were in favor of its validity.

4. The cases believed to sustain the jurisdiction of this Court are *Ex parte Garland*, 4 Wall. 333, 378; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123; *Bradley* v. *Fisher*, 80 U. S. 335, 357; *Konigsberg* v. *State Bar of California*, 353 U. S. 252; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Barsky* v. *Board of Regents*, 347 U. S. 442, 451; *Lambert* v. *California*, 355 U. S. 225.

5. The text of the statute involved is as follows:

"4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony shall, upon

such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

"Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys."

Said statute is found at vol. 29, p. 108 of the New York Consolidated Laws (Judiciary Law) and is c. 649, §44 at p. 1380 of the Laws of New York 1945.

Question Presented by the Appeal

Does New York Judiciary Law Section 90, subdivision 4, as construed as requiring the disbarment without a hearing of attorneys who have been convicted in a United States District Court of the felony of perjury, deprive the attorneys of the right to follow their calling and deprive them of liberty and property without due process of law contrary to the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States of America?

Statement of the Case

Appellant Siegel was admitted to the Bar of the State of New York on October 31, 1934, appellant Miss Shapiro on December 15, 1948. Both engaged in practice until February 18, 1958 when each was sentenced by the United States District Court for the Southern District of New York as a result of their trial and conviction for the offenses of perjury and obstruction of justice. Appellant

Siegel was sentenced to one year and one day on each of seven counts and sentence was suspended; on each of four of the same seven counts he was fined five hundred dollars and the payment of the fines has been suspended pending appeal. Sentence was suspended upon each of five counts of the indictment on which appellant Miss Shapiro was found guilty.* The jury had acquitted both appellants upon three counts charging conspiracy to obstruct the due administration of justice, influencing a stenographer to destroy stenographic notes, and preparing certain substitute stenographic notes for submission to the grand jury (New York Court of Appeals Notice [Siegel] pp. 5, 6; [Shapiro] p. 6).

On May 8, 1958 The Association of the Bar of The City of New York served upon each appellant a petition to the Appellate Division of the New York Supreme Court, First Judicial Department, reciting the federal proceedings culminating in the sentence and submitting the matters to that court for determination as to whether the court should enter an order pursuant to subdivision 4 of Section 90 of the New York Judiciary Law, striking the name of each appellant from the roll of attorneys (Ibid.).

Each appellant submitted an answering affidavit and brief and requested the said court to conduct a hearing as to the nature of appellants' misconduct, if any, and as to their qualifications to remain members of the New York bar; it was the position of appellants in both the federal and state courts that the actions for which they had been indicted and tried were undertaken in good faith to protect

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* On February 17, 1959 the United States Court of Appeals for the Second Circuit unanimously affirmed the judgments against the appellants in the federal prosecutions (*United States* v. *Siegel and Shapiro* (Appendix hereto)). Petition to this Court for a writ of certiorari thereon will be filed March 19, 1959.

the interests of innocent clients. (Siegel affidavit to Appellate Division par. 5, Shapiro affidavit to Appellate Division par. 22.) Appellants claimed before the Appellate Division that automatic disbarment without hearing would deprive them of their property interests in the right to practice their profession, and deprive them of due process of law in violation of the state and federal constitutions; and as part of said application argued the unconstitutionality of the statute as construed to require automatic disbarment without any hearing. Appellants' request for oral argument at which the necessity for a hearing on the merits would have been demonstrated was not granted.

Without acting upon the application for leave to be heard, and without any hearing, the Appellate Division on July 3, 1958 made and entered orders striking the name of each appellant from the roll of attorneys.

Appellants then applied to the New York Court of Appeals for leave to appeal and as part of the said applications argued that their conduct as lawyers, and the relationship of that conduct to their right to practice, were matters on which no determination had been made by any court, *including the court which disbarred them;* their fitness to practice law was of course not in issue before the federal tribunal which heard the criminal charges against them (New York Court of Appeals Notice [Siegel] pp. 2, 32-34, [Shapiro] pp 2, 14).

In the New ourt of Appeals each appellant argued to that court York Court of Appeals Notices, p. 33):

> "Hence, if the Judiciary Law were to be construed so as to disbar the respondents, on the sole basis of the jury verdicts rendered against them, in the federal court, without providing them an opportunity to be

heard on the facts in their own defense, the statute would unconstitutionally operate to deprive the respondents of their rights without due process."

On October 16, 1958 the New York Court of Appeals denied the motions for leave to appeal without any opinion (5 N. Y. 2d 707, 708). Notices of appeal to this Court were thereupon filed in the Appellate Division as the "court possessed of the record" (Rule 10 [3] of the Rules of this Court).

The indictment of appellants contained twelve counts, all relating to informal memoranda or aide memoire of appellant Siegel's conversations during the year 1954 with one Harvey M. Matusow and the notes for these memoranda. At the times in question appellant Miss Shapiro was associated with appellant Siegel in the practice of law in appellant Siegel's offices in New York City (New York Court of Appeals Notice [Siegel] pp. 6-7).

Appellant Siegel had come into contact with Harvey M. Matusow some months before Matusow recanted, in January, 1955, his testimony as a Government witness in the trial of thirteen alleged Communists in the Southern District of New York in 1952. Mr. Siegel was counsel to The Nation and in that capacity had objected to the publication of an article entitled "The Informer" which tended to cast doubt on the veracity of certain Government witnesses. After "The Informer" had been printed* over his protest Mr. Siegel received a visit in April, 1954, from Matusow, who was sent to him by a staff member of The Nation. So far from being impressed by what Matusow told him, Mr. Siegel formed the impression that Matusow was irresponsible—a conclusion later reached by United States District Judge Edward J. Dimock who had con-

* As the cover article in the issue dated April 10, 1954.

ducted the new trial hearing in *United States* v. *Flynn*. (Siegel Affidavit, par. 26.)

In accordance with his established professional routine Mr. Siegel made or caused to be made private memoranda about his interviews with Matusow, which were six in number. Following Matusow's recantation in 1955 Mr. Siegel was summoned before the grand jury in the Southern District of New York and accurately recited the substance of his conversations with Matusow. Thereupon the Assistant U. S. Attorney asked Mr. Siegel to be a Government witness before Judge DIMOCK. (New York Court of Appeals Notice [Siegel] p. 7.) In preparing for the U. S. Attorney's use in questioning him before Judge DIMOCK (Siegel affidavit, par. 13) a chronological summary of his talks with Matusow, Mr. Siegel consulted his private memoranda or aide memoire. He found that there had been noted therein the names of three of Mr. Siegel's clients, upon whom Matusow had intruded in seeking audience with Mr. Siegel. Mr. Siegel and his office associate, Miss Shapiro, deleted references to these clients, who had no information about Matusow's recantation, and no possible interest therein. (New York Court of Appeals Notice [Siegel] pp. 6-8.)

Following receipt of the chronological summary from Mr. Siegel the Assistant U. S. Attorney decided against presenting this evidence to Judge DIMOCK. After further grand jury appearances of Mr. Siegel and Miss Shapiro, the Government charged them with testifying falsely that the aide memoire were as originally dictated when in fact (as Mr. Siegel admitted to the Government) they had been retyped as above stated. (Id. p. 8.)

Mr. Siegel and Miss Shapiro persistently declined to reveal the names of the clients deleted from the aide memoire until waivers of the attorney-client privilege

could be obtained. When obtained, the names of the three clients were disclosed. They were Miss Gloria Swanson, Colonel Lewis L. Bredin and Michael Shore. The grand jury interviewed these three clients and it was confirmed that they had unexpectedly encountered Matusow while seeing Mr. Siegel and that they had no information concerning Matusow or his recantation. (Id. p. 8.)

On the first occasion when Mr. Siegel identified memoranda to the grand jury as being the originals, Miss Shapiro, who had retyped some of them, was unavailable because of illness and without conferring with her he could not distinguish the originals from the retyped memos; he gave false or erroneous testimony about some of them. Following Miss Shapiro's return and his further appearance before the grand jury Mr. Siegel voluntarily sought to clarify with the U. S. Attorney his efforts and Miss Shapiro's* to protect his innocent clients from involvement in the notoriety of the Matusow public hearings before Judge Dimock. (Id. pp. 8-9.)

On March 21, 1955, Miss Shapiro testified for the first time and Mr. Siegel for the second time about the aide memoire he had produced; the same evening he telegraphed the U. S. Attorney and the following morning went to the latter's office to explain the situation. So far from being accorded the opportunity to return before the grand jury and clarify his testimony, Mr. Siegel found himself closeted with the Assistant United States Attorney and grilled on the basis that he "knew something" about Matusow's recantation which he had not told. Subsequent grand jury

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* After Mr. Siegel had testified that some of the aide memoire were what he had dictated at the time, Miss Shapiro had written up stenographic notes for some of the memos, conforming to the retyped version. She testified on March 21, 1955, that these were the original stenographic notes.

examinations of appellants were directed at nothing of that kind; indeed, two months before the indictment of appellants, Judge Dimock had made the finding that recantation had been Matusow's own unaided idea. (Siegel affidavit, pars. 17, 18, 20-26.)

The trial of the case consumed some five weeks. In the course of the trial both appellants took the witness stand and each was interrogated and cross-examined at very great length. The case was a closely contested one. The verdict was reached after eleven hours of deliberation; the jury deliberated nine hours on a Friday and reached its verdict on Saturday morning; the jurors had returned to the courtroom repeatedly for additional instructions, sought in vain to obtain a transcript of the judge's charge, and made requests, in some instances not granted, for additional instructions. The court's charge and the subsequent proceedings in connection therewith occupy 110 printed pages (New York Court of Appeals Notice [Siegel] p. 6).

With the benefit "of a very extensive and carefully prepared probation report," at the time of sentencing United States District Judge John F. X. McGohey stated with the agreement of the Assistant U. S. Attorney that the evidence "shows complete absence of any such intention on the part of either of these defendants to contribute in any way to whatever Matusow did in connection with his participation in the Flynn trial, and his recantation of his testimony." Judge McGohey further stated

> "that the testimony of the defendants with respect to what was in their minds when they did this has not been counteracted by any evidence offered by the Government and furthermore in so far as the record discloses there were no other persons present at any time at any of these meetings other than the Colonel Bredin and Miss Swanson and Shore." (Id. p. 9.)

The Substantiality of the Federal Question

Appellants proceed by appeal pursuant to 28 U. S. C. §1257(2) because they assert the repugnancy of a state statute to the Constitution. *Lambert* v. *California*, 355 U. S. 225.

This Court has repeatedly held that the right to practice law is a property right which cannot be denied without due process. *Konigsberg* v. *State Bar of California*, 353 U. S. 252; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232.

The cases are legion which hold that elementary to due process are notice, hearing and an opportunity to defend. This holding applies to those seeking to acquire the property right of admission to the bar. *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123. *A fortiori* it is applicable to lawyers confronted with disbarment.

When a state may not deny admission to the bar unless it complies with due process, a legislative provision for the expulsion of lawyers from their profession must satisfy at least equivalent standards. *Ex parte Garland*, 4 Wall. 333. This Court there said (at 379):

> "The attorney and counsellor being, by the solemn judicial act of the Court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the Court, or *at the command of the legislature*. It is a right of which he can only be deprived by the judgment of the Court, for moral or professional delinquency." (Emphasis added.)

This Court further said in *Ex parte Garland* (at 378):

> "They [lawyers] hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded."

To the same effect is *Bradley* v. *Fisher*, 80 U.S. 335, 357.

Since a hearing below was denied to appellants at every level, this case squarely presents a question "readily distinguished" in *Barsky* v. *Board of Regents*, 347 U. S. 449, 452: the constitutionality of a statute which would require "the automatic termination of a professional license because of some criminal conviction of its holder." In *Barsky* this Court specifically noted the statute whose constitutionality is here in question. *Id.* at note 11.

That the question presented is so substantial as to require plenary consideration with briefs on the merits and oral argument for its resolution is apparent from examination of the other cases cited herein to sustain the jurisdiction. For, automatic disbarment upon conviction deprives a lawyer of the right to have all constitutionally relevant factors considered. Cf. *Barsky, supra,* at 451.

The mere opportunity to submit written statements, even in a proceeding for admission to the bar, does not satisfy due process. In *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, where such opportunity was afforded and utilized, this Court declared (at 123) that:

> "We think that the petitioner having shown by his application that, being a citizen of the United States and a certified public accountant under the laws of a State, he was within the class of those entitled to be admitted to practice under the Board's rules, he should not have been rejected upon charges of his unfitness

> without giving him an opportunity by notice for hearing and answer. The rules adopted by the Board provide that 'the Board may in its discretion deny admission, suspend or disbar any person.' But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such notice, hearing and opportunity to answer for the applicant as would constitute due process. * * *
>
> "The petitioner as an applicant for admission to practice was, therefore, entitled to demand from the Board the right to be heard on the charges against him upon which the Board has denied him admission."

(Because Goldsmith had failed to demand a hearing, the decision below was nevertheless affirmed.)

It follows from what this Court said in *Goldsmith* that the New York Courts' reception of written statements only did not constitute the hearing on the charges against appellants which due process prescribes.

In the case at bar appellants were deprived summarily of the right to practice law, not because of any finding of unfitness, but because they had been convicted for acts which, were grounded in their overzealous concern with duty to their clients.

The record of the federal criminal trial, which was not before the state courts, would have shown that motivation had there been ruled irrelevant. By requiring disbarment without consideration in any tribunal of the motives actuating these lawyers or the question whether they were consistent with high standards of character and professional integrity, the State has adopted an inflexible procedure in its Judiciary Law which contrasts with that in its Education Law, of which this Court said in *Barsky* v. *Board of Regents*, 347 U. S. 442 at 452:

> "It accordingly has sought to attain its justifiable end by making the conviction of any crime a violation of its professional medical standards, and then leaving it to a qualified board of doctors to determine initially the measure of discipline to be applied to the offending practitioner.
>
> Section 6515 of the New York Education Law thus meets the charge of unreasonableness."

Appellants' endeavors to protect Miss Gloria Swanson, Colonel Bredin and Mr. Shore from unfair publicity proved fruitless. The three clients testified before the grand jury and also at appellants' trial, where they manifested their utter lack of any relevant information about Matusow and corroborated fully those portions of appellants' grand jury and petit jury testimony touching them.

The trial of appellants eventuating in their conviction was so restricted as not to permit them to show the true nature of their challenged acts and the circumstances of their occurrence. At a disciplinary hearing they might have established (as other convicted lawyers have succeeded in doing in the past) that they were innocent, and that they merited retention in their profession.

The United States Court of Appeals opinion affirming their convictions (see Appendix) centers on the issue of materiality and rests upon a new and novel extension of the federal criminal law which was never urged by the Government in this case and had never been advanced in any reported judicial definition of perjury.

Briefly, the United States Court of Appeals has now decided that the conceded immateriality of an answer actually given is unimportant if there is *any* answer to the question which *could have* been material—despite the provision of the perjury statute (18 U. S. C. §1621) that only he who

"states or subscribes any material matter which he does not believe to be true, is guilty of perjury . . . . " (Compare this Court's observation in *Sinclair* v. *United States*, 279 U. S. 263, that "the materiality of what is falsely sworn" is the "element in the crime of perjury" [at 298].)

If usurpation by a lawyer-witness of the tribunal's function to determine materiality has felony consequences (*i.e.*, is something more than a contempt) it might reasonably be found after a disciplinary hearing that such felony consequences were unforeseeable at the time. Under certain circumstances a lawyer may with propriety risk contempt for his client's welfare and "should refuse to disclose a privileged communication though the court send him to jail". (Decision No. 312, American Bar Association Ethics Committee, quoted in Drinker, Legal Ethics, p. 299.) If in so doing he commits acts which have never before been thought criminal, and a United States Court of Appeals later holds that such was their effect, a searching investigation is necessary before unprofessional conduct can be inferred from such finding of criminality.

The writer has found no decision of this Court passing upon the many state statutes which permit or require disbarment of a lawyer found guilty of a felony, automatically and without any hearing. The question whether such statutes deny due process is of national importance. In this country the legal profession symbolizes today the rule of law, which is at stake in many parts of the world; it is submitted that this Court should determine whether state legislatures may command violation of due process in the governance of the legal profession.

CONCLUSION

In view of the substantiality of the federal question, one, it is believed, which has never before been passed upon by this Court, the issues should be resolved upon plenary consideration. It is urged that probable jurisdiction be noted and the case set down for argument.

Respectfully submitted,

WILLIAM G. MULLIGAN,
Attorney for Appellants

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 109—October Term, 1958.

(Argued November 13, 1958 Decided February 17, 1959.)

Docket No. 25130

UNITED STATES OF AMERICA,

Appellee,

—v.—

R. LAWRENCE SIEGEL and HADASSAH R. SHAPIRO,

Appellants.

Before:

HAND, HINCKS and MOORE,

Circuit Judges.

Appeals from judgments entered upon the verdict of a jury in a prosecution for perjury (§1621, Title 18, U. S. Code), and for obstructing justice (§1503, Title 18, U. S. Code).

WILLIAM G. MULLIGAN, *for the Appellants.*

ARTHUR B. KRAMER, *for Appellee.*

HAND, *Circuit Judge*:

This is an appeal from judgments of conviction entered by Judge McGohey upon the verdict of a jury. The indict-

ment was in twelve counts, the 1st for a conspiracy to obstruct justice, the 2nd, 3rd, 4th, 5th and 6th for obstructing justice under §1503 of Title 18, U. S. C., and the 7th, 8th, 9th, 10th, 11th and 12th for perjury under §1621 of Title 18, U. S. C. The jury returned a verdict of guilty against the appellant Siegel on the 3rd, 4th and 5th counts for obstructing justice and upon four of the perjury counts, 7, 8, 9 and 10. It found a verdict against the appellant Shapiro on counts 3, 4 and 5 and on perjury counts 11 and 12. It acquitted both defendants upon the conspiracy count and on two of the obstruction counts, 2 and 6. The judge imposed upon the appellant Siegel a suspended sentence and put him on probation for a year and a day on each of the seven counts on which he was convicted, the sentences to run concurrently; in addition, he imposed a fine of $500 upon each of the four perjury counts. He suspended the imposition of sentence on the appellant Shapiro on all five of the counts on which she was convicted, and put her on probation for one year, the sentences to run concurrently. The appeal is based upon three main points: (1) that the prosecution did not establish that the testimony charged in the indictment was "material" to a proceeding pending at the time before the grand jury of the Southern District of New York; (2) that the defendants were not shown to have obstructed justice; and (3) that for seven separate reasons, stated in detail, the trial was unfair. The chief, and indeed the only important, question on this appeal is whether the testimony of the two appellants was "material" to an investigation pending before the grand jury for the Southern District of New York, instituted to examine two affidavits of one, Matusow, in which he recanted testimony that he had given on two trials in the Southern District of New York in July 1952 and in January 1954. The first of these was a prosecution against Elizabeth Gurley Flynn and others for violation of the

"Smith Act," and the second was a prosecution of one, Jencks, for filing a false affidavit. Matusow's testimony had been important in both these trials, but in January 1955 he submitted an affidavit in each case in support of an application for a new trial, in which he recanted his original testimony, adding in the *Flynn* case that one of the prosecutors had known that his testimony was false and had procured him to give it. In February 1955, the District Attorney for the Southern District of New York instituted an investigation before the grand jury, the object of which was to ascertain the truth of Matusow's recantation and of his charge against the prosecutor.

The grand jury subpoenaed Siegel, a lawyer, because it was known that Matusow had talked with him about his recantation; and the subpoena directed him to produce any documents relating to Matusow. Siegel appeared on March 3, 1955, and swore that beginning in April 1954 Matusow had had seven interviews with him, seeking his help in raising money to publish a book about his, Matusow's, career in the role of a "blacklister." Siegel testified that shortly after each interview he had dictated memoranda of the substance of the interview, which the grand jury directed him to produce. On March 17th, he reappeared and presented as the original memoranda documents, at least three of which were substitutes for the originals. Before this,—on March 7th—he had brought to the District Attorney in charge of the case a "chronological" memorandum which he said contained all the information contained in the original memoranda. The District Attorney read this, but, not being satisfied, asked for the originals and it was between the 7th and the 17th that Siegel prepared the substitute. The District Attorney, being still dissatisfied, asked for the stenographic notes from which the typed pages had been transcribed. On March 20th, at Siegel's direction his stenographer, Mary

Manna, changed the original stenographic notes in her books so that they should correspond with the changed memoranda put in evidence on the 17th. Some of her original pages were destroyed and some were interlined; and Siegel put these fabricated pages in evidence on March 21st. The other appellant, Shapiro, was also a member of the bar, and she was not only privy to, but actually participated in, all that Siegel did and she corroborated on the witness stand his testimony before the grand jury.

The prosecution relied especially upon the substituted memoranda—and supporting stenographic notes—purporting to state the contents of three of Siegel's seven interviews with Matusow: those of April 21, June 18 and November 3, 1954. Although the originals of these had been destroyed by the appellants, independent evidence showed that the substituted versions contained omissions. The first of these omitted to say that the interview had not ended at Siegel's office, but that Siegel and Matusow had gone together to "Blair House"--a New York restaurant—and thence to the apartment of an actress, named Swanson, where there was also present Bredin, a retired officer of the U. S. Army. The omission in the second memorandum was of a dinner, also at "Blair House," given by one, Shore, a manufacturer of "a mechanical parking device," who had made an assignment for the benefit of creditors and was "involved in a bankrupt proceeding." The omission in the third memorandum was of a statement to Siegel at his office in which Matusow had spoken of a telephone talk that he had had with Swanson while he was in Dallas, Texas. Bredin, Shore and Swanson were all clients of Siegel and his excuse for omitting all mention of their names was that he feared it would injure them in their business or personal affairs, if it should appear that they had been present at his interviews with Matusow, or that Matusow had talked with Swanson in Dallas.

As we have said, the appeals turn upon whether it was perjury and an obstruction of justice, to fabricate the false memoranda and swear that they were complete records of the interviews. That in turn depends upon whether that testimony was "material" to the investigation under way before the grand jury as to Matusow's recantation. Matusow was at the time of his interview with Siegel trying to get a publisher for his book, and it does not appear why he accompanied Siegel on the occasions when Siegel saw Swanson, Bredin and Shore, or why he reported to Siegel his telephone talk with Swanson in Dallas. Conceivably the omitted passages, if followed up, by cross-examination, might have led to relevant disclosures. However, we do not rest our affirmance of the convictions upon that possibility; on the contrary we will assume, *arguendo*, that the disclosure of the omitted passages would have contributed nothing to what the grand jury was seeking. The error of the appellants' position is that they confuse the "materiality" of the question with the "materiality" of the answer, as though it was proof that the question was immaterial, if the answer would have been so. It is, however, at once apparent that this substitutes the opinion of the witness for that of the tribunals as to the "materiality" of the answer. No matter how right the witness might be in believing that the answer would not contribute to the investigation, he was bound to leave that decision to the tribunal. A question is "material," no matter what the answer may be, unless it appears by its terms that the answer cannot be "material." In the case at bar it was enough to make Siegel's testimony "material" as to the originality of the memoranda that the interviews between him and Matusow might have thrown light upon his recantation. If Siegel was right in supposing that a truthful answer could not have assisted the grand jury, no doubt it would be reasonable to temper the severity of the sen-

tence, as Judge McGohey did in the case at bar. But the eventual impertinence of what was concealed could not excuse preventing by false testimony the grand jury from deciding that question. It is scarcely necessary to add that "materiality" is always a question for the court. *Sinclair* v. *United States*, 279 U. S. 263, 298; *Carroll* v. *United States*, 16 Fed. (2) 951 (C. A. 2); *United States* v. *Alu*, 246 Fed. (2) 29, 32 (C. A. 2).

The other points raised by the appellants are too trivial to require discussion. Nothing, for instance, could be more unwarranted than the charge that Judge McGohey was unfair or partial in his conduct of the trial. On the contrary he showed the utmost concern for the rights of the appellants whose strictures display an entire misapprehension of the essentials of a judge's duties.

We have discussed only the perjury counts; but what we have said is equally applicable to the attack upon the convictions under the "obstruction" counts. *Bosselman* v. *United States*, 239 Fed. Rep. 82 (C. A. 2); *United States* v. *Polakoff*, 121 Fed. (2) 333 (C. A. 2); *Broadbent* v. *United States*, 149 Fed. (2) 580 (C. A. 10); *Catrino* v. *United States*, 176 Fed. (2) 884 (C. A. 9).

Convictions affirmed.

Order of Court of Appeals in Siegel Matter

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the 16th day of October A. D. 1958.

PRESENT:

HON. ALBERT CONWAY,
Chief Judge, Presiding.

In the Matter

—of—

RUBIN L. SIEGEL (Also known as R. Lawrence Siegel),
An Attorney,

Appellant.

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

GEARON KIMBALL
Deputy Clerk

(Seal)

Order of Court of Appeals in Shapiro Matter

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the 16th day of October A. D. 1958.

PRESENT:

HON. ALBERT CONWAY,
Chief Judge, Presiding.

In the Matter

—of—

HADASSAH R. SHAPIRO, An Attorney,
Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

GEARON KIMBALL
Deputy Clerk

(Seal)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 773

In the Matters

—of—

ELLIS L. SLOAN (also known as R. LAWRENCE SLOAN) and HANNAH R. SHAPIRO, attorneys,

Appellants,

—vs.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEALS AND BRIEF

FRANK H. GORDON
Counsel for Appellee
43 West 43rd Street
New York 36, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 773

In the Matters

—of—

RUBIN L. SIEGEL (also known as R. LAWRENCE SIEGEL) and HADASSAH K. SHAPIRO, attorneys,

Appellants,

—vs.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEALS

Appellee moves the Court to dismiss the appeals herein under Rule 16 on the ground that they do not present a substantial federal question for the following reasons:

Under Section 90-4, Judiciary Law of New York, automatic disbarment as an attorney results from conviction for a crime which is cognizable under New York law as a felony; the New York courts have held that the convictions of these appellants were for felonies; the only defenses interposed by appellants in the courts below were law points, as to which they filed answers and submitted

briefs and thus in fact were afforded a "hearing" and due process; historically, a felony conviction is followed by disbarment of course; and, finally, these offenses were such as to bear directly on appellants' moral fitness to remain on the roll of attorneys.

Appellee further moves the Court to dismiss the appeals herein under Rule 16 on the ground that the appeals are not within the jurisdiction of this Court because the New York Court of Appeals denied leave to appeal and did not decide the cases on their merits.

FRANK H. GORDON
Counsel for Appellee

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 773

In the Matters

—of—

RUBIN L. SIEGEL (also known as R. LAWRENCE SIEGEL) and HADASSAH R. SHAPIRO, attorneys,

Appellants,

—vs.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEALS

Statement

On January 18, 1958, after a joint jury trial, the appellants were convicted in the United States District Court for the Southern District of New York of perjury as to material matter and obstruction of justice. On February 18, 1958, sentence was suspended as to both appellants; Siegel was also fined.

The indictment alleged (annexed as an exhibit to the disbarment petitions) and it appears from the opinion of Judge Hand in the United States Court of Appeals (at pages 19 and 20 of the Appendix to appellants' Statement as to Jurisdiction), that appellants submitted manufactured documents to a Federal Grand Jury and perjuriously claimed them to be original memoranda. Thereafter, they sought to substantiate the validity of the false memoranda by producing fabricated stenographic notes, thus compounding their perjury.

The perjury counts under which appellants were convicted were cast under Title 18, Section 1621, United States Code.* The crimes are felonies, and are equivalent to first degree perjury which is also a felony under Sections 1620, 1620-A, and 1633, Penal Law of New York.* Thus, disbarment of appellants as attorneys was statutory under subdivision 4 of Section 90, Judiciary Law of New York.*

Appellants have consistently contended that the crimes for which they were convicted are not the equivalent of felonies under New York law; they advanced their argument orally and by brief before appellee's Committee on Grievances, by verified answer and brief before the Appellate Division, First Department, and by motion, affidavit, and brief submitted to the New York Court of Appeals on the application for leave to appeal. They predicate their claim of lack of due process upon the disagreement of the New York courts with their legal contentions.

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* Set forth in full in the Appendix to this brief.

ARGUMENT

I

Appellants were not denied due process but were afforded an adequate hearing.

A. ***Automatic disbarment of an attorney under the Judiciary Law of New York occurs on conviction for felony under Federal law only when the crime is also cognizable as a felony under equivalent New York law.***

Subsections 4 and 5 of the Judiciary Law of New York* provide that, when an attorney is convicted of a "felony," he ceases to be an attorney or competent to practice as such, and his name shall be stricken from the rolls by order of the Appellate Division; but, if there be reversal or pardon the Appellate Division may vacate or modify the disbarment. *Matter of Kaufmann*, 245 N. Y. 423, 428-429, 157 N. E. 730, 732. To avoid the inequity which might follow a foreign conviction for an offense there classified as a felony but not considered a serious crime under New York law, the courts of New York have held that the automatic disbarment under the New York Judiciary Law follows only when conviction in another jurisdiction, such as Federal court, is for a crime equivalent to a felony under New York law. *Matter of Donegan*, 282 N. Y. 285, 290-291, 26 N. E. 2d 260, 262.

This interpretation of the New York statute by the Court of Appeals of New York will be followed by this Court. *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94, 99.

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* See Appendix, page 9.

B. *The crime of perjury as to material matter under Federal law has been held by the New York courts to be the equivalent of first degree perjury, a felony under New York law.*

When appellants were convicted under Title 18, Section 1621, United States Code,* they were necessarily convicted of perjury as to material matter. Perjury as to material matter is also a felony under the Penal Law of New York, for it is first degree perjury under Sections 1620, 1620-A, and 1633.** *Matter of Hiss*, 276 App. Div. 701, 96 N. Y. S. 2d 850. The Appellate Division also made this exact determination in its disbarment orders of July 3, 1958, in the instant cases.

It is submitted that this determination is both correct on a simple reading of the statutes and also one which this Court will follow. *Lerner* v. *Casey*, 357 U. S. 468.

C. *Appellants were afforded a hearing and due process.*

Before service of the amended petitions, upon which the Appellate Division acted, appellants presented extended oral argument and briefs at hearings before the Committee on Grievances of appellee. They contended that their convictions were not for felonies under New York law and that therefore they were entitled to a hearing on the merits of their conduct before entry of disbarment orders. The Committee did not agree and presented the matters to the Appellate Division under subsection 4 of Section 90, Judiciary Law.

Appellants renewed their argument by answers and brief submitted to the Appellate Division. True, oral argument was not had. But, that was a procedural matter involving practice in the Appellate Division, not due process. Oral argument is often not permitted in an appellate court

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* See Appendix, page 9.

** See Appendix, pages 10-11.

on motions. The present motion, governed by Rule 35-3, is illustrative.

The fact is that appellants had a full opportunity to present to the Appellate Division their contentions, arguments, and authorities in support of their position. Since their legal arguments were without force, no additional trial or hearing on the merits was necessary. Thus, they were afforded the due process declared in *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117. We do not view *Barsky* v. *Board of Regents*, 347 U. S. 442, as requiring a contrary conclusion.

II

Historically, felony conviction has disqualified an attorney or counselor-at-law as a matter of course.

It has long been the law in New York that conviction of a felony terminates the license of an attorney to practice and requires that his name be struck from the rolls. Fitness to practice is adversely determined by felony conviction. *Matter of Ginsberg*, 1 N. Y. 2d 144, 134 N. E. 2d 193; *Matter of Donegan, supra; Matter of Kaufmann, supra.*

Nor is this rule unique in New York. It is so in the Federal courts as well. *Ex parte Wall*, 107 U. S. 265. In that case the Court said (at p. 273):

> "If regularly convicted of a felony, an attorney will be struck off the roll as of course, whatever the felony may be, because he is rendered infamous."

The Court then quoted from Archbold's Practice, from Tidd's Practice, and from Lord Mansfield, all to the same effect. The last reference appears to be to *Ex parte Brounsall*, 2 Cowper's King's Bench Reports 829, 98 Eng. Rep. (Full Reprint) 1385. There Lord Mansfield, in 1778, determined that a larceny conviction showed that Brounsall

should be struck off the roll of attorneys, and concluded: "Having been convicted of a felony, we think the defendant is not a fit person to be an attorney. Therefore let the rule be made absolute."

In the instant cases the offenses for which appellants were convicted, and which they admit, bear directly upon their fitness to practice. Obviously, the bar should not include members who deem it appropriate to submit altered documents to a Federal grand jury and to manufacture stenographic notes to lend authenticity to their false memoranda. Cf. *Matter of Stock*, 265 App. Div. 107, 37 N. Y. S. 2d 807; *Matter of Ryan*, 143 N. Y. 528, 38 N. E. 963; *In re Ulmer*, 208 Fed. 461 (D. C. N. D. Ohio).

III

Appeal does not lie from denial of leave to appeal by the New York Court of Appeals.

Appellants, by their Notices of Appeal, seek to invoke appeal to this Court from the New York Court of Appeals. That court did not decide the merits of their cases but merely denied leave to appeal. Therefore, technically, there is no jurisdiction under Section 1257, Title 28, U. S. Code, and their appeals should be dismissed. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157.

CONCLUSION

For the foregoing reasons, the appeals should be dismissed for failure to present a substantial federal question, *Grace* v. *Board of Commissioners of the State Bar of Alabama*, 320 U. S. 708, and because jurisdiction is lacking.

Respectfully submitted,

FRANK H. GORDON,
Counsel for appellee.

APPENDIX

Title 18, U. S. Code:

§1621. PERJURY GENERALLY

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 773.

New York Judiciary Law, Section 90:

4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

5. Upon a reversal of the conviction for felony of an attorney and counsellor-at-law, or pardon by the president of the United States or governor of this state, the appellate division shall have power to vacate or modify such order or debarment.

New York Penal Law:

§1620. PERJURY DEFINED

A person is guilty of perjury who 1. Swears or affirms that he will truly testify, declare, depose or certify, or that any testimony, declaration, deposition, certificate, affidavit or other writing by him subscribed is true, in, or in connection with, any action or special proceeding, hearing, or inquiry, or on any occasion in which an oath is required by law or is necessary for the prosecution or defense of a private right or for the ends of public justice or may lawfully be administered, and who in such action or proceeding or on such hearing, inquiry or other occasion wilfully and knowingly testifies, declares, deposes or certifies falsely, or states in his testimony, declaration, deposition, affidavit or certificate any matter to be true which he knows to be false; or

2. Swears or affirms that any deposition, certificate, affidavit or other writing by him subscribed, is true, and which contains any matter which he knows to be false affecting the title to any real or personal property, including the assignment or satisfaction of a mortgage, and upon which reliance is placed; or

3. Having been appointed or designated to be an interpreter in any judicial action or proceeding knowingly and wilfully falsely interprets any evidence, matter or thing between a witness and the court or a justice thereof in the course of an action or special proceeding. As amended L. 1909, c. 240, §58; L. 1927, c. 680; L. 1929, c. 86, §1; L. 1935, c. 632, §1; L. 1939, c. 186, eff. April 1, 1939.

4. Knowingly and wilfully makes a false statement, or gives information which he knows to be false, in any application for a civil service examination filed in accordance with section fourteen of the civil service law. As amended L. 1957, c. 149, §2, eff. Oct. 1, 1957.

§1620-a. PERJURY IN THE FIRST DEGREE

A person is guilty of perjury in the first degree who commits perjury as to any material matter in or in connection with any action or special proceeding, civil or criminal, or any hearing or inquiry involving the ends of public justice or on an occasion in which an oath or affirmation is required or may lawfully be administered. Added L. 1935, c. 632, §2, eff. April 30, 1935.

§1633. PUNISHMENT OF PERJURY AND SUBORNATION OF PERJURY

1. Perjury in the first degree and subornation of perjury in the first degree are felonies and are punishable by imprisonment for a term not exceeding five years, or by a fine of not more than five thousand dollars, or by both.

2. Perjury in the second degree and subornation of perjury in the second degree are each misdemeanors and are punishable by imprisonment for not more than one year or by a fine of not more than five hundred dollars, or by both. As amended L. 1935, c. 632, §5; L. 1936, c. 93, eff. July 1, 1936.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 773

In the Matters

—of—

RUBIN L. SIEGEL (also known as R. LAWRENCE SIEGEL) and HADASSAH R. SHAPIRO, attorneys,

Appellants,

—vs.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEALS

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IN THE

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—of—

RUBIN L. SIEGEL (also known as R. LAWRENCE SIEGEL) and HADASSAH R. SHAPIRO, attorneys,

Appellants,

—vs.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEALS

Appellants R. LAWRENCE SIEGEL and HADASSAH R. SHAPIRO respectfully submit this brief in opposition to the motion of Appellee, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (herein "the Bar Association"), to dismiss their appeals.

Introductory Statement

In their Statement as to Jurisdiction, appellants question the validity of §90, subdivision 4 of the New York Judiciary

Law on the ground of its repugnancy to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. In its motion to dismiss and supporting brief, the Bar Association does not assert the validity of the statute or its harmony with the Constitution of the United States. It argues that appellants do not present a substantial federal question; that they were not denied due process but were afforded an adequate hearing; and that this appeal does not lie from the order by the New York Court of Appeals denying leave to appeal.

Herein we meet these contentions.

I.

Whether appellants were deprived of their offices and livelihood without due process, in being disbarred automatically without a hearing, presents a substantial federal question

The Bar Association served amended petitions upon appellants, instituting the disbarment proceedings, wherein it pleaded the federal perjury convictions, charged that these offenses were New York State felonies as well as federal felonies, and asked for summary disbarment orders. The said petitions incorporated copies of the indictment, judgments, and orders of probation.

There was no charge of moral turpitude. The Bar Association contented itself with recital of the federal convictions.

The amended petitions asserted that New York Judiciary Law, §90, subdivision 4 required automatic disbarment. Appellants answered that under the Federal and State Constitutions they were assured a full hearing as to their guilt of the offenses of which they had been convicted and

as to their qualifications to continue as members of the Bar; they asked the court to determine that they had not been convicted of a felony under New York law, and not to disbar them summarily but to grant a hearing at which they could have the opportunity to establish their fitness to remain members of the Bar (Siegel affidavit,[1] R. 35-36, 77; Shapiro affidavit, R. 45-46, 34-35).

The Court of Appeals denied leave to appeal, without oral argument or a hearing. The question of the validity of the statute as construed and applied, under the Due Process Clause of the Fifth and Fourteenth Amendments, was squarely presented for decision to the Court of Appeals, and its decision denying leave to appeal necessarily was a holding in favor of the validity of the statute.

The Bar Association contends that the professional death sentences were administered pursuant to due process. It admits that appellants did not have any judicial hearing and were not permitted oral argument before either the Appellate Division or the Court of Appeals. The only claim it makes about a hearing is (Brief, p. 6) that before service of the amended petitions, the two lawyers presented oral arguments and briefs before the Committee on Grievances. But even at that level, appellants—with everything dear and meaningful in life to them at stake—were not granted a hearing. The Grievance Committee did not invite them to appear personally, to give testimony, to offer

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[1] In his affidavit, R. 35-36, Siegel said, in part: "I respectfully allege that the actions of deponent which have been challenged were not a betrayal of the interests or confidences of any clients, or committed with criminal or evil intent, or with intent to commit any wrongdoing, or activated by any selfish interests, pecuniary or otherwise. More specifically, I allege that the acts which have been challenged were performed solely, in order to and in the attempt, to protect the interests of certain innocent clients, as is particularly set forth hereinafter."

witnesses, to cross-examine, to offer character evidence, to explain the nature and circumstances of their acts in question, including their motivation—in short, to experience the basic attributes of a hearing. Cf. *Shaughnessy* v. *United States*, 345 U. S. 206, Mr. Justice JACKSON in dissent, id. at 225. While appellants' counsel was permitted to appear, his participation was limited to argument and a brief on the question whether the federal perjury convictions were equivalent to felonies under New York law; he was not allowed to introduce proof of appellants' innocence or the absence of moral turpitude (Siegel affidavit to Appellate Division, R. 77).[2]

Appellants certainly do not, as the Bar Association mistakenly asserts, "predicate their claim of lack of due process upon the disagreement of the New York courts with their legal contentions" (Brief, p. 4), but upon the Constitution of the United States, decisional authority, and fundamental principles. Nor is the denial to appellants of oral argument by the Appellate Division merely "a procedural matter involving practice in the Appellate Division";[3] it is

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[2] Appellee (Brief, p. 6, third paragraph) concedes, in the following language, that appellants were not accorded, but denied, a hearing before the Grievance Committee: "They contended [before the Committee on Grievances of appellee] that their convictions were not felonies under New York law and that therefore they were entitled to a hearing on the merits of their conduct before entry of disbarment orders. The Committee did not agree and presented the matters to the Appellate Division under subsection 4 of Section 90, Judiciary Law."

[3] The Bar Association is absolutely mistaken in its conception of a New York disciplinary proceeding. In its Brief (pp. 6-7), in attempting to justify the proceedings before the Appellate Division, it states that "Oral argument is often not permitted in an appellate court on motions." This familiar concept has no application. Submission of papers, without oral argument, is not unusual when the appellate court sits as a court of review on a record made below. But here, the Appellate Division was sitting as the court

in and of itself a denial, without due process, of rights secured by the Constitution of the United States. *Standard Airlines Inc.* v. *Civil Aeronautics Board*, 177 F. 2d 18, 21 (App. D. C.).

In *Barsky* v. *Board of Regents of N. Y.*, 347 U. S. 442, this Court upheld the constitutionality of New York State Educational Law, §§6514, 6515. The statute was found to be within the degree of reasonableness required to consti-

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of original jurisdiction, and not as an appellate court. Judiciary Law, §90 provides that "The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law" and grants to the Appellate Division in each department in the State the authority to conduct disciplinary proceedings relating to attorneys. In New York State, the judicial machinery has two modes of operation, and proceedings in the courts are accordingly divided into two classes—actions, which are ordinary proceedings by one person against another, and special proceedings, which are extraordinary or unusual proceedings, but also are litigations in a court of justice. *Application of Callahan, et al.*, 262 App. Div. 398. Unlike an action, a special proceeding is begun, not by a summons, but usually either by a writ issued in the name of the people of the state, or by a court order. Instead of pleadings, in the nature of a complaint and answer, there are usually a petition and return; instead of a trial, there is a hearing; and instead of a judgment, there is a final order. *Application of Burge*, 203 Misc. 677, rev'd on other grounds in 282 App. Div. 219, aff'd 306 N. Y. 811. Appellee likens a disbarment proceeding to a motion. But a special proceeding is not a motion—which is an incidental move or step in a litigation—but analogous in its scope and purpose to an action. A special proceeding is an application for an order, in an independent prosecution of a remedy, and jurisdiction in it is obtained by original process. *Re Callahan, supra.* A motion, on the other hand, is an application in a proceeding already pending, and jurisdiction of it depends upon whether or not jurisdiction has been obtained in the action or special proceeding of which it is a part. *Lyons Falls Farmers' Co-op. Association, Inc.* v. *Moore*, 158 N. Y. S. 2d 1013. A proceeding instituted for the removal of an attorney is a special proceeding and that is precisely why appeal to the Court of Appeals does not lie as of right (*Matter of Mathot*, 222 N. Y. 8). It is obvious from the above description of the New York judicial machinery that a *hearing* should be an integral part of a special proceeding to remove a lawyer from his office, including any proceeding to strike his name from the roll of attorneys.

tute due process of law in the field of health, which is permeated with public responsibility, because the statute provided for, and the doctor-respondent (after conviction and serving his sentence) did receive, a painstaking and complete review of the evidence and the issues at every step of the proceedings against him.[4] This Court remarked at the time: "That statute is readily distinguishable from one which would require the automatic termination of a professional license because of some criminal conviction of its holder." 347 U. S. at 452. The Bar Association fails to deal with *Barsky*, directly or indirectly, yet finds it necessary to recognize that such a decision exists. Squinting at *Barsky* through the wrong end of its telescope, the Association says:

> "We do not view Barsky v. Board of Regents, 347 U. S. 442, as requiring a contrary conclusion."

That is all that the Association, here defending the Judiciary Law against the constitutional infirmity pointed out in *Barsky*, has to say about *Barsky*.

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[4] After affirmance of the contempt conviction, written charges were filed against Barsky with the State Department of Education seeking disciplinary action after due hearing because of the conviction. Upon filing an answer, Barsky was given an "extended hearing" before the Department's Medical Committee on Grievances. Testimony was heard. Then the three doctors, constituting the sub-committee, made a written report of their findings, determination and recommendation, expressly taking into consideration, among other things, "the testimony and letters submitted in support of his [Barsky's] character." Then all ten doctors on the Grievance Committee reviewed the case. Thereafter, the Committee on Discipline of the State Board of Regents held a further hearing at which Barsky appeared in person and by counsel. After reviewing the facts and issues, it filed a detailed report. The Commissioner of Education issued the order, but its operation was stayed by the New York Court of Appeals, pending an appeal to this Court. Barsky then instituted a proceeding in the New York Supreme Court. That court reviewed the record, and the matter then proceeded up to the State Court of Appeals. (347 U. S. at 445-447.)

The Bar Association is here as advocate in a cause it first dealt with as judge. Its Brief in support of this motion so admits (p. 6): it says that appellants contended before its Grievance Committee that "they were entitled to a hearing on the merits of their conduct before entry of disbarment orders. The Committee did not agree . . . " Thus the Bar Association conceives that it shall decide when to take the step—the great, decisive step—of moving to disbar the lawyer and thus end his means of support for his family and himself, and shall also decide whether this shall occur without a hearing. In the County of New York the Bar Association makes the presentation to the Appellate Division. If the Bar Association's position as an advocate before this Court is correct, then everything after its own initial determination is automatic—and the automation derives solely from §90 of the New York Judiciary Law, the statute under attack on this appeal.

Such an advocate, belittling the absence of any judicial hearing whatever in a plenary lawsuit (for such is the nature of a New York special proceeding), and seeking a one-punch knockout by its present motion to dismiss the appeal to this Court, is unmoved by the tolerance and humanity which this Court long ago expressed in *Bradley* v. *Fisher,* 80 U. S. 335 at 355:

> "Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family."

The Bar Association, undervaluing a hearing in this case, states (Brief, p. 8) that "the offenses for which appellants were convicted, and which they admit, bear directly upon their fitness to practice." It is not true that appellants "admit" criminal offenses. They pleaded not guilty to the indictment, when convicted they appealed to the United States Court of Appeals for the Second Circuit, and, after affirmance of the convictions there, they filed on April 11, 1959 a petition for certiorari seeking review of the convictions in this Court. They have consistently denied both guilt of the crimes for which they have been indicted and convicted and the commission of any act justifying their disbarment.

It is also untrue that, as the Bar Association states on page 1 of its motion, "the only defenses interposed by appellants in the courts below were law points". The record shows that in addition to legal arguments including the constitutionality of the statute denying them any hearing, they presented lengthy factual considerations which would be urged at a hearing (see Record, pages 35-78, Siegel affidavit, and pages 34-46, Shapiro affidavit, both before Appellate Division). It is the orders below, rather than appellants' arguments, which are based only upon consideration of the legal effect of the judgments of conviction.

What a hearing is worth to lawyers in these circumstances appears dramatically from *Matter of Donegan*, 282 N. Y. 285. After two lawyers had been convicted in the Southern District of New York of the federal felony of conspiracy, and the convictions had been affirmed on appeal (101 F. 2d 829), and after this Court had denied certiorari (306 U. S. 635), the Appellate Division disbarred them "automatically" and without any hearing, pursuant to the predecessor statute of §90(4) of the New York Judi-

ciary Law. Upon Donegan's appeal the New York Court of Appeals reversed the order of automatic disbarment because it found that the federal offense was under New York law a misdemeanor rather than a felony; proceedings were remitted to the Appellate Division, which ordered a reference.[5]

The Referee concluded that the respondents were innocent of the offenses of which they were convicted and that the proceeding should be dismissed. In his report, the Referee found:

> "I am convinced that the respondents have completely answered the charges made against them and have overcome the presumption existing because of the concession that the judgment [of conviction] is *prima facie* evidence of guilt of the offense charged." (265 App. Div. 774, 777.)

The Appellate Division upheld the Referee, noting that he had reached his conclusions, "After an exhaustive inquiry into their [the respondents'] conduct" and refused to overrule him "on account of the verdict of the jury to the contrary in the United States District Court." (265

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[5] In its *Donegan* opinion the Court of Appeals said: "Although disbarment is not strictly a punishment for crime, but only the withdrawal of a privilege • • • it cannot be denied that the requirement of automatic and irrevocable disbarment for life provided by the Judiciary Law, is in effect a consequence most severe, and partakes of the nature of punishment. Hence the statute must be interpreted in the light of the fundamental canon that penal statutes must be strictly construed. • • • Strict construction • • • of the Judiciary Law requires that the term 'felony' include only those federal felonies which are also felonies under the laws of this State, and exclude such federal felonies as are 'cognizable by our laws as a misdemeanor or not at all.'" (282 N. Y. at 292.) These comments show that the Bar Association exercised a decisive judgment when it set these appellants down for disbarment, declining to accept the contention that the federal felony was a state misdemeanor.

App. Div. at 777.) The Court of Appeals affirmed (294 N. Y. 704).

The Appellate Division, in sustaining the Referee, further remarked:

> "We have read the record with a realization that attorneys should be held to a high standard of integrity. They should not, however, be subjected to the punishment of disbarment except upon evidence, as distinguished from suspicion not sustained by proof." (Id. at 778.)

If the statute had not been construed and applied to deny the present appellants a hearing, and if they had been granted a hearing, they might have established that their conduct was not an offense at all, or at the most constituted a New York State misdemeanor.

Unlike New York law, the federal criminal code does not recognize more than one degree of perjury. In New York, perjury as to material matter—first degree perjury—is a felony (New York Penal Law, §1620-a), while perjury under circumstances not amounting to perjury in the first degree is a misdemeanor (Penal Law, §1620-b). Materiality is what distinguishes perjury in the first degree from perjury in the second degree in New York. Materiality is an issue for jury determination. (*People* v. *Clemente*, 285 App. Div. 258, aff'd, 309 N. Y. 890.)

Because of the rulings made on materiality and other matters at the trial, the record before the Referee might well have differed from that before Judge McGoHEY. In *Donegan*, 265 App. Div. 774 at 778, in sustaining the Referee, the Appellate Division remarked that his report "in many important particulars differs from the record which was under consideration by the Circuit Court of Appeals" when the latter court was reviewing and uphold-

ing the federal convictions of the two lawyers there involved.

At a hearing in the instant case guilt or innocence could have been independently, and differently, determined. The Referee could have found that appellants' allegedly wrongful acts amounted to no more than a mistaken notion of their duty to clients. (Cf. Mr. Justice DOUGLAS, in dissent, in *Barsky, supra*, 347 U. S. at 474.) In *Donegan*, the Appellate Division, in upholding the Referee, said "that those acts in which the respondents participated have not been shown to be discreditable . . . " (265 App. Div. at 778). It is conceivable that the Referee could have so concluded and reported to the Appellate Division in the case at bar.

Again, as in *Donegan*, the Referee could have found that "the respondents have completely answered the charges made against them and have overcome the presumption existing because of the concession that the judgment is *prima facie* evidence of guilt of the offense charged." (265 App. Div. at 777.) And, as in *Donegan*, "After an exhaustive inquiry into their conduct," by the Referee, he could have found "that the respondents are innocent of the offenses of which they were convicted and that the proceeding should be dismissed." (265 App. Div. at 777.)

The Referee could have found that appellants were trying to protect their clients, and undoubtedly would have taken into account the fact that in the State of New York public policy imposes the most stringent duty upon the lawyer to protect confidences of clients. Rule 37 of the Canons of Professional Ethics required appellants to keep sacred and secret clients' confidences learned in the course of their professional employment. This secrecy is considered so essential to the attorney-client relation that New York law allows it to override even the full disclosure requirements of trial. N. Y. Civil Practice Act, §353. New York law

prevents the disclosure by anyone without the client's authorization of any communication between attorney and client made in the course of professional employment, whether such disclosure be to court, jury, legislative committee, government agency, or a disciplinary body. N. Y. Civil Practice Act, §353-a. The name and whereabouts of a client are in proper circumstances confidential communications not to be divulged by the lawyer. *Elliott* v. *United States*, 23 App. D. C. 456; Nos. 259, 428, Opinions of the Committee on Professional Ethics of the New York County Lawyers Association; Drinker, LEGAL ETHICS, p. 136. In New York State, a lawyer has been disbarred for attempting to misuse confidential communications. *Matter of Proujan*, 257 App. Div. 297.

The report of the Referee, in assisting the Court in the matter of any punishment to be dealt out to the appellants, and to each of them separately, doubtless would have noticed, in addition to the motivation of the appellants which was to protect innocent clients and not to aid or benefit themselves, their number of years at the Bar, their reputations and previous spotless records, and their ill health and pressures at the critical periods in question; the fact that they cooperated with the U. S. Attorney's office by voluntarily, completely, and without any bargaining, correcting their testimony and not pleading the Fifth Amendment before the grand jury when coming back to correct their testimony, and the further fact that they themselves furnished all the evidence and proof in the case; the behavior of the prosecuting officials, including the summation of the prosecutor; and the frankness of the appellants when they testified at their own trial in the District Court.

The trial judge tempered the sentence (Statement as to Jurisdiction, Appendix, pp. 21-22). Similarly the Appellate

Division might have decreed a suspension or censure if it did not dismiss the proceeding altogether. The result is unknowable because here there has been a special proceeding devoid of any hearing, with a prejudged result untouched by judicial discretion. In fairness to the Bar Association, it has followed the statute. Judiciary Law §90(4) declares that an attorney convicted of a felony "shall, upon such conviction, cease to be an attorney . . ." In fairness to the courts of New York, they, too, had no alternative; the same statute directs that when a lawyer is so convicted and there is presented to the Appellate Division an authenticated judgment of his conviction "thereupon the name of the person so convicted *shall, by order of the court,* be struck from the roll of attorneys." (Emphasis added.)

II.

These appeals are properly before this Court

The Bar Association argues in its motion to dismiss these appeals and in its Brief that "technically" the appeals are not within the jurisdiction of this Court because the New York Court of Appeals did not decide appellants' cases on the merits but "merely" denied leave to appeal.

The Bar Association cites *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U. S. 157, where this Court had a choice between reviewing a judgment of the Court of Civil Appeals of Texas and reviewing an order of the Texas Supreme Court denying a writ of error therefrom; it had the choice because appeals were brought here from the rulings of both Texas courts; in deeming the reviewable ruling to be that of the Court of Civil Appeals, this Court decided nothing applicable to the instant case.

Here appellants confronted a peculiar situation in that the Appellate Division of the New York Supreme Court

was the court of first instance, although ordinarily it is a court of intermediate appeal. The New York Court of Appeals denied leave to appeal and hence made the only orders having the effect of affirming the disbarment orders of the Appellate Division.

Inquiries of the Clerk of the New York Court of Appeals disclosed that it is that court's practice to refrain from stating in orders denying leave to appeal the issues which have been determined. Instead, the Clerk certified for this Court the *full text* of the motions for leave to appeal *and the printed briefs* which the Court of Appeals considered, as well as certifying the orders now appealed from. Thereby the Clerk actually certified each of the questions which these appellants raised and in effect certified to this Court that these were the questions before the New York Court of Appeals which were submitted to it, considered by all the judges, and decided adversely to appellants; for these are the actions of the Court of Appeals represented by what the Clerk certified. As Mr. Justice CARDOZO, when Chief Judge of the New York Court of Appeals, stated:

> "Motions for leave to appeal have the careful consideration of all the judges of the court, * * *." *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 298.

The record certified to this Court demonstrates that the Court of Appeals necessarily passed upon the substantial merits of the federal question urged here by appellants.

Appellants contended to the New York Court of Appeals that they were constitutionally entitled to a hearing. That court's refusal to hear them necessarily rested upon a finding that this constitutional claim was not good on the merits. Such a finding is the judgment on the merits rendered by the highest State Court in which a decision could

be had, which 28 U. S. C. §1257 requires. *Tumey* v. *Ohio*, 273 U. S. 510; *Van Huffel* v. *Harkelrode*, 284 U. S. 225.

The appeal from the orders of the highest court in the state brings up for review the actions of the Appellate Division. In the State of New York the "court possessed of the record" (Rule 10 of this Court's Rules, paragraph 3) is the Supreme Court, not the Court of Appeals.[6]

Appellants' notices of appeal mention the orders of the Appellate Division and the orders of the Court of Appeals; appellants' record certifies the proceedings in both courts; appellants' notices of appeal were filed in the Appellate Division, whose clerk has separately certified the Appellate Division record. Whether or not "technically" appellants have appealed from the Appellate Division orders, they have done so in substance, and there is no doubt that the Appellate Division decisions are here for review, as well as those of the Court of Appeals.

CONCLUSION

For the foregoing reasons the Court should note probable jurisdiction herein and deny appellee's motion to dismiss the appeal.

Respectfully submitted,

WILLIAM G. MULLIGAN
Counsel for Appellants

Dated: New York, N. Y.
April 24, 1959

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[6] Frederick Bernays Wiener, *The New Supreme Court Practice, A Summary of the New Rules* (1954), 40 A. B. A. J. 659.